

## **SUMMARY OF PUBLIC COMMENTS AND THE BOARD'S RESPONSES**

### **I.**

#### **Introduction**

The State Personnel Board (Board) proposes to amend sections 52.4, 243.3, and 243.6 of Title 2, Chapter 1, of the Code of Regulations (CCR). A 45-day public comment period on this rulemaking action was held from November 6, 2020, through December 21, 2020. A public hearing was held on December 29, 2020. The comments received by the Board were taken under submission and considered. A summary of those comments and the Board's responses are below.

### **II.**

#### **Summary of Written Comments from Anne M. Giese, Chief Counsel, California Attorneys, Service Employees International Union, Local 1000 (SEIU, Local 1000).**

##### Comment I: Amended § 52.4.

The SEIU feels that using the wording "sent to the Appellant" in the proposed subdivision (e)(1)(Q) is unclear. Instead, the SEIU recommends using "mailed to the Appellant". The SEIU asserts that "mailed" is more specific than "sent," and makes it clear how the appellant will receive the Notice of Voided Appointment while maintaining consistency with the other subdivisions of the regulation.

##### **Response I:**

The Board thanks and appreciates the SEIU for its feedback to this regulatory package. The Board agrees and will modify the text in section 52.4, subdivision (e)(1)(Q) to include "is mailed" rather than "sent" to ensure consistency within section 52.4 and to clarify what constitutes the appellant's receipt of the Notice of Voided Appointment.

##### Comment II: Amended § 52.4.

Additionally, the SEIU believes that the Notice of Voided Appointment should be accompanied by a Notice of Reimbursement, which clearly delineates the appellant's right to appeal the specified amount of reimbursement, even if the appellant does not wish to challenge the voided appointment itself.

## **Response II:**

The Board agrees with the SEIU's recommendation that the Notice of Voided Appointment should include language that clearly communicates to the appellant that they may challenge either the voided appointment and/or the amount of reimbursement. However, the Board does not believe that a separate additional notice is necessary. As such, we have added the following text to section 52.4, subdivision (1)(Q) regarding notice requirements: "The Notice of Voided Appointment shall specify the amount of reimbursement ordered and inform the Appellant of their right to challenge the amount of reimbursement separately from the Voided Appointment pursuant to section 243.6, subdivision (a)."

## **Comment III: Amended § 243.3.**

The SEIU believes that the addition of "or a portion of" is beneficial because it allows the Executive Officer or Board to determine an amount of reimbursement less than all compensation. Current rule only permits the SPB to consider less than full repayment of compensation on an appeal. However, if the section is to be amended to provide discretion in this decision making, the regulation should also be clarified to include how the Executive Officer and/or Board will reach its decision in the determination of reimbursement amounts. It is unclear which factors guide the determination of how much compensation is to be reimbursed to the employee. This absence of guiding factors or strict practices may lead to arbitrary decisions and unfairness in the amounts of compensation employees are required to pay back. Whereas the current regulation requires an employee who acted in ways other than good faith to reimburse all compensation resulting from the appointment, and therefore little guidance is needed, the proposed regulation appears to provide the Executive Officer and Board with discretion regarding the amount of compensation to be reimbursed.

In order to provide clarity, the SEIU recommends that the following language be added to the first sentence of section 243.3: "based upon the evidence presented." Additionally, the SEIU recommends that the second sentence of section 243.3 include the following: "In instances...a finding that the employee acted in other than good faith in securing the appointment, ...require the employee to reimburse all or a portion of the compensation resulting from the appointment, based upon the evidence presented."

This clarifying language regarding the Board's decision based on the evidence presented is present in the current regulation and should not be deleted. Taking it out of the regulation would make it less clear as to what the Executive Officer's decision regarding partial compensation reimbursement is based upon.

### **Response III:**

After further consideration of the SEIU's comments, the Board finds that, although the intent of the proposed amended language to section 243.3 was to allow mitigating factors to be considered prior to assessing the reimbursement amount, the proposed amendment creates an additional level of review without defining the process or "guiding factors" the Executive Officer may employ in order to determine the amount of compensation owed.

The Board will remove the proposed amended language and retain the current language in subdivision (c) which requires an employee who accepted an appointment in other than good faith to reimburse all compensation resulting from the appointment.

An appeal challenging the voided or corrected appointment and/or reimbursement of compensation owed already provides state employees a clear, fair, and transparent process to adjudicate compensation owed by the employee and/or the validity of the action taken to void or correct the appointment.

As such, the Board has reinstated the following language under section 243.3, subdivision (c): "In the event of an appeal to the Board challenging the amount of reimbursement, the Board may require the employee to reimburse all or a portion of the compensation resulting from the appointment based upon the evidence presented".

### **Comment IV: Amended § 243.3.**

The SEIU believes that it is unclear what "other than good faith" means precisely and whether it is intended to incorporate the meaning in section 243. The other related rules also use "other than good faith." The phrase appears to include more than simply "bad faith" behavior. Adding "who does not act in good faith in accordance with section 243(c)" might provide clarity.

### **Response IV:**

The Board will incorporate the recommended language to section 243.3, subdivision (c), to provide clarity. The clarifying language will also be incorporated into section 243.2 to ensure consistency across all sections pertaining to unlawful appointments.

### **III.**

#### **Summary of Written Comments from Eraina Ortega, Director, California Department of Human Resources (CalHR).**

##### Comment I: Amended § 243.3.

The CalHR points out that under the existing regulation, the Board may already exercise its discretion to provide for less than full reimbursement of compensation based upon the evidence presented during an appeal proceeding.

##### **Response I:**

Please see II., Written Comments, Response III (*ante*, at p. 3). The Board has reinstated the following language under section 243.3, subdivision (c): “An employee who does not act in good faith in accordance with section 243, subdivision (c), when accepting an appointment that is subsequently voided or corrected shall reimburse all compensation resulting from the appointment. In the event of an appeal to the Board challenging the amount of reimbursement, the Board may require the employee to reimburse all or a portion of the compensation resulting from the appointment based upon the evidence presented.”.

##### Comment II: Amended § 243.3.

The CalHR recommends that the proposed changes distinguish between appointments voided or corrected by CalHR within one year pursuant to both existing Government Code sections 243.2 and 19257.5, and those appointments that occurred beyond one year of the appointment that are corrected or voided by the Board or Executive Officer pursuant to current section 243.2.

##### **Response II:**

Please see II., Written Comments, Response III (*ante*, at p. 3). The Board’s reinstatement of the current regulatory language of section 243.3, subdivision (c) addresses the CalHR’s concerns expressed in Comment II.

### **IV.**

#### **Conclusion**

The Board appreciates the comments and feedback it received regarding this proposed regulation. The modified text with the changes clearly indicated are available to the public as stated in the Notice of Modification to Text of Proposed Regulation.